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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ALYSSA L. et al., Persons Coming
Under the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

SARAH L.,

Defendant and Appellant.

F078169

(Super. Ct. Nos. 18CEJ300125-1,
18CEJ300125-2, 18CEJ300125-3,
18CEJ300125-4)

OPINION

APPEAL from orders of the Superior Court of Fresno County. Brian M. Arax,
Judge.

Seth F. Gorman, under appointment by the Court of Appeal, for Defendant and
Appellant Sarah L.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County
Counsel, for Plaintiff and Respondent.

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Sarah L. (mother) appeals from orders declaring her four daughters, now eight-
year-old Alyssa L., five-year-old Kaylee L., two-year-old F.L. and 21-month-old G.L.
(collectively, the girls), dependents under Welfare and Institutions Code section 300,

subdivisions (b) and (d),¹ removing them from the custody of their father, Justin L. (father), and denying her placement of the girls pursuant to section 361.2, subdivision (a) (hereafter 361.2(a)). Mother contends the juvenile court erred in making jurisdictional findings as to her; the juvenile court, in denying her placement, exercised its discretion with a misunderstanding of the applicable law and there is insufficient evidence of detriment; and the Fresno County Department of Social Services (Department) did not make reasonable efforts to prevent the necessity of removal of the girls into foster care. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2017, mother and father were married and living together in Fresno with the girls and mother's son from another relationship, L.G. On December 28, 2017, mother took the girls and her son, and drove to a friend's home in Texas.

On January 1, 2018,² mother reported to a Texas sheriff's deputy that father had sexually assaulted her son while they were living in Fresno. Mother told the deputy she had been involved in a verbally and physically abusive relationship with father for the past seven years. Mother said father spit on her, called her a whore, and threw her into a wall by her hair. Mother also said father "choked" Alyssa twice, and he had been verbally and mentally abusive toward the children.

Mother told the deputy that on December 28, 2017, she had been planning to come to Texas for a visit, but was not sure if she was going to stay. That day, she was running an errand in Fresno with her son when he told her father had sexually assaulted him. He told her that about a month before, while he and father were on a trip to the family's storage unit in Fresno County, father pulled to the side of the road, showed him some

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Subsequent references to dates are to dates in 2018, unless otherwise stated.

pornography, and orally and anally copulated him.³ Mother asked her friend for money, packed a trailer, and left for Texas that day.

This was the first time mother had heard anything like this – she knew father had gotten extremely drunk before and “joked around” with Alyssa when she was five, saying something inappropriate that mother could not remember. Mother said father was “touchy feely” with himself around the kids and thought it was funny to “flash them.” Father also was “touchy feely” with her; sometimes he would come up behind her when she was getting dishes out of the dishwasher and hump her “doggy style” in front of the kids.⁴

Detective Amy Stacy, with the Hays County Sheriff’s Office in Texas, interviewed mother on January 8. Mother recounted incidents of domestic violence involving father. While father was intoxicated, he pushed her when she was pregnant with F.L., and grabbed her hair and pushed her against the wall when she was pregnant with Alyssa. Father primarily was mentally and emotionally abusive. He would say things like he was going to bury them in the backyard and he wanted to kill them. About a week before she left for Texas, father grabbed mother hard on her arms and left bad bruises. Father had “verbally and mentally broken” Alyssa in “a lot of ways,” calling her

³ In a written statement mother completed following the deputy’s interview, mother stated she resolved to leave father “[a]fter trying to seek counseling for our issues.” Mother added that she “decided to pack” after “hearing my kids cry at night” and “they started to beg me to leave” father and “never come back.” Mother said her son revealed the sexual abuse “once he knew he would never have to see his stepfather again.” Her son told her that father had been drinking vodka the day of the assault. Mother stated she recently discovered father’s license had been restricted, so he should not have been driving at all.

⁴ Mother’s interview was videotaped and the deputy who interviewed her wrote an incident report. While the deputy stated in the incident report that mother said father was “groping her, and groping her daughter Alyssa,” and described father’s actions as “groping,” mother does not use the word “groping” on the videotape. Mother said in her written statement that Alyssa often witnessed father being “forcefully sexual” toward mother and “thrusting his pelvis into my butt whenever I bend over.”

“dumb bitch” and “stupid cunt,” and saying he wants to kill her. Father used to spank L.G. and Kaylee, leaving bruises. Mother said at Christmas 2012, father choked Alyssa, momentarily cutting off her circulation. He choked Alyssa another time, sometime in the past three years.

When Stacy asked mother how father groped Alyssa, as noted in the deputy’s report, mother said father had come up to Alyssa from behind and “smacked her butt,” but he had never “squeezed her.” Father ran around the house wearing boxers and did not adequately cover himself, so the girls had seen a lot. Mother denied she talked to the deputy about “groping” Alyssa, but she said father did grope her around Alyssa. Alyssa recently had been showing signs of self-mutilation—she had been scratching herself with tacks. Mother asked her about it and Alyssa said, “it just feels good.” Mother self-mutilated when she was much younger, but she “proudly quit.” Mother promised Alyssa they would get her some tattoos when she turned 18, but told her whenever “you feel that feeling,” she should come talk to mother and they would work it out.

Mother planned to leave Fresno on Friday, December 29, 2017, but while running an errand the day before, her son asked her if they were coming back. When mother said “probably not,” he told her about the sexual assault. Mother told him they would leave Fresno that day and they left three hours later. Mother’s friend in Texas sent her money for a trailer and gas, which got her halfway there. At mother’s request, father sent money to get them the rest of the way. Mother later confronted father with L.G.’s allegation over the phone and through text messages, but father denied it.

Mother said father had severe back pain and self-medicated with marijuana and alcohol. Mother had father go into an alcohol recovery program, but he hid huge bottles of vodka in his car. Mother said, “father does drink and drive” and his license was revoked because he was involved in a DUI hit and run. Father tried to have her take the blame for the accident, but it did not work. Father was supposed to go to a class, pay heavy fines, and perform community service. Mother added that father “was driving

around Fresno with a revoked license in his little Smart car.” Mother said father never attempted suicide during their relationship, but he had tried to kill himself during an earlier relationship. Father, however, had flailed a gun around a lot and made her watch him hold it to his head.

Forensic interviews of L.G., Alyssa and Kaylee took place in Texas on January 12.⁵ L.G. described the sexual assault in detail, and said that father told him “If you tell anyone, I’ll kill you.” L.G. believed father was really drunk—a six-pack of hard cider was at L.G.’s feet and father was hiding a bottle of vodka. L.G. said father once strangled Alyssa with one hand when she was on the ground and made her face turn red. When L.G. was seven, father picked him up by the neck, held him against a wall, and dropped him on the ground. His head hit the tile. L.G. told mother about the incident. Since then, father has hit them, called them names and been a “huge jerk.” It hurt L.G. when father would say he was not his son.

Alyssa, who was nearly seven years old, said that when she was four, father held her to the floor and choked her because he thought she had done something to Kaylee, although she had not. Mother, who was in the room when it happened, told father Alyssa did not do anything to Kaylee, but father whispered to Alyssa that he knew she had done it. Alyssa was scared of father and did not want to talk to him again, but she knew she “had to do it” and had to sing him the goodnight song. Alyssa could not remember if father used one or two hands, but he held her down where his fingers could touch the floor. Father stopped choking her when mother yelled at him to stop. Since then, father had only called them names – he called her the “B-word” and “f-word” and talked mean to them. Alyssa knew of a few times when father choked L.G. One time they were

⁵ The juvenile court reviewed the videotapes of the police interviews of mother and father, and the forensic interviews of L.G., Alyssa and Kaylee.

wrestling when father choked him with two hands around his throat, with his fingers touching.

Alyssa admitted she hurts herself, which sometimes happens when she has gotten mad at someone. She usually uses tacks or her fingernail. The last time it happened she scratched herself after getting mad at Kaylee. Alyssa said father usually got mad if she started hurting herself, even though he promised he would not. Mother knew about the self-mutilation, and three days before the interview, mother told her if she promised to stop, she would let Alyssa get tattoos and piercings. Alyssa said she likes the hurt feeling and when she pinches herself, it feels good. Anger and frustration make her want to hurt herself. Both Alyssa and Kaylee denied that anyone touched them inappropriately.

On February 8, a Texas judge issued a temporary ex parte protective order, which protected mother and the children from father. The hearing on the protective order was set for February 21 in the Texas court.

The Dissolution Proceeding

On February 15, mother informed the Texas sheriff's office that an attorney in Fresno called stating father was filing a motion to force her to bring the girls back to Fresno and appear in court. The sheriff had not yet served father with the protective order.

The following day, father filed a petition for dissolution of marriage in Fresno County Superior Court, in which he requested sole legal and physical custody of the girls. On February 21, father obtained ex parte temporary emergency orders which granted him sole physical custody of the girls, with supervised visits for mother, and ordered mother to immediately return the girls to Fresno County, where they were to remain pending further court order. A hearing was set for March 13.

In his declaration in support of the ex parte request for custody, father stated mother was diagnosed with postpartum depression following G.L.'s birth and was taking antidepressants. Father said mother's change in behavior strained their marriage and they

saw a marriage and family therapist for counseling from October 1, 2017 through late December 2017. In late November 2017, mother proposed taking a solo vacation to Texas to visit her family and attend her cousin's wedding; mother intended to leave on December 28, 2017 and return on January 28, 2018. Father eventually agreed to allow mother to take the children with her to Texas, and he maintained daily telephone contact with them while they were gone. Father claimed mother called him on January 28 and told him she and the children were not returning to Fresno, she wanted a divorce, and if he contested the children's relocation to Texas, she would allege fake domestic violence and molestation claims against him. Father then learned that mother had disenrolled Alyssa from school before she left for Texas.

On February 27, mother showed Stacy her son's black and white wide-ruled composition book, in which he wrote about the sexual assault. Stacy noted that was the only entry in the journal. Mother told Stacy she had the book for a while and had seen it under her son's mattress when they were in California.

Following a March 13 hearing in Fresno County family court, the court issued a custody order that if mother's residence remained in California, she and father would share joint legal and physical custody of the girls, but if mother established residency in Texas, father would have sole legal and physical custody. In accordance with the court's order, mother returned the girls to father, then went back to Texas.

The next day, the Department received two referrals. The first alleged general neglect of L.G., Alyssa, Kaylee, and F.L. by mother; emotional abuse of L.G. and the girls by father; and sexual abuse of L.G. by father. It was reported L.G. stated father sexually abused him orally and anally, which mother reported to law enforcement, but it was not known when the sexual abuse occurred; Alyssa disclosed physical and psychological abuse by father; and father abused psychotropic medications and alcohol. The Department found these allegations "inconclusive."

The second referral alleged general neglect of L.G., Alyssa, Kaylee and F.L. by mother. It was reported that father had been awarded temporary sole legal and physical custody of the girls after mother fled to Texas with the children to escape domestic violence with father. In addition, L.G. disclosed father sexually abused him during a forensic interview while in Texas; Alyssa disclosed father hit her on the head on multiple occasions, shoved her into a wall and, on one occasion, choked her; father verbally abused Kaylee; and during a Skype or FaceTime call with father, he put a gun to his head and said he would kill himself, and also told the family he would hurt them. That referral was “evaluate[d] out.”

The Law Enforcement Interview of Father

On April 10, Fresno County sheriff’s detectives interviewed father about L.G.’s allegations of sexual assault. Father said he agreed to send mother to Texas to attend her cousin’s wedding at the end of January, and told her she had to take the children because of day care and his work schedule. He said mother started “getting really weird” the last week of December and said she needed to go sooner. Mother said she would stay until the wedding and return on January 28. On Thursday, December 28, 2017, mother called father at work and told him she was not coming back, and she needed more money because she was renting a trailer. When father got home from work that evening, the house “was trashed” and looked ransacked. It became clear to father that mother was not coming back.

About a month after mother left, she was not letting father see or talk to the children. Father decided to file for divorce. Mother told him if he filed she would accuse him of abuse, including sexual abuse. Father said mother sent him a text message on April 10 asking him if he would pay off her debts if she relinquished her parental rights to him. Father asked the detectives why mother would give up her rights just to pay off her debt if he was such an abusive father. Father said mother would do anything to get the kids and to get child support.

When a detective asked father about L.G.'s journal entry that described the alleged sexual abuse, father responded it was "b.s." Father denied that any of the acts L.G. listed took place. Father said L.G. would write and say anything mother told him. Father denied that he was drinking the day he and L.G. went to the storage shed. While he usually drank hard cider or vodka, he quit drinking in January. When one detective stated it did not appear from L.G.'s forensic interview that he was coached, as his statements were consistent and he was upset when talking about it, father thought he rehearsed it, and said he and mother were great actors.

The Initiation of Dependency Proceedings

On May 7, the Department received a crisis referral that father hit multiple cars while driving under the influence. Alyssa, who was in the front passenger seat, was transported to the hospital for medical evaluation. She did not have any visible injuries, but complained of chest pain. When a social worker interviewed her, Alyssa disclosed L.G.'s reports of sexual molestation, the incident when father choked her, and domestic violence in the home. When asked whether father had ever touched her private parts, Alyssa initially reported he did not do anything to her, but then said, "well not anymore." Alyssa said father was different now and he did not drink alcohol. Father was arrested for multiple DUI's, felony child endangerment, reckless driving, and hit and run. Alyssa and her three sisters, who had been left in paternal grandfather's care at father's home, were taken into protective custody.

The following day, the social worker spoke with mother, who was in Texas with her son. Mother denied having contact with father. Mother told the social worker she fled to Texas due to her son's disclosures of sexual abuse and father's domestic violence, and she reported the sexual abuse to Texas police and obtained an emergency protective order. Mother said father brought kidnapping charges against her. She said the court completely overlooked the protective order and informed her if she did not bring the girls back to California, they would be taken away from her. Consequently, mother brought

the girls back to Fresno. Mother said she begged the court to allow the girls to remain in her care, but the court said she could have 50/50 custody if she remained in California. Mother was unable to stay in California, however, because she did not have a place to stay, her son lived with her in Texas, and she was trying to flee from father due to the child abuse and domestic violence allegations. Mother told the social worker she wanted the girls back in her care and while she wanted to file for full custody of the children, her attorney advised her to wait to see if the Department would place the children with her. Mother admitted she had been diagnosed with post-traumatic stress disorder (PTSD), anxiety and depression.

A team decision meeting was held at the Department on May 9, with Department social workers. Father and the paternal grandparents, Rodney and Karen L., personally attended the meeting, while mother and Stacy appeared via telephone conference. Stacy said mother was staying in a women's shelter in Texas, and Texas child protective services (CPS) had assessed mother's home and found it safe. Stacy sent her file to Fresno County law enforcement on March 1. Mother said she returned the girls to father in April 2018 because the judge ordered her to do so; otherwise, the police would have picked the girls up and removed them from her care. Mother did not attempt to apply for custody of the children in Texas.

Father admitted to drinking vodka and beer in the past; he claimed May 7 was the first time he had a drink since before January 2018. He claimed he drank a "couple swigs of vodka" and admitted he was under the influence while driving with Alyssa. Father said he began drinking two years ago, but he did not normally get drunk and the May 7 incident "has only happened a few times in my life." Father admitted being an alcoholic. Paternal grandmother claimed mother treated the children like "adult friends" and told them about her fights with father. Paternal grandfather felt father was being treated unfairly and was the only person being accused of abuse, when mother had been emotionally abusive to the children by talking to them like they were adults.

At the conclusion of the meeting, it was determined that voluntary family maintenance services were not appropriate, as it was unsafe to return the girls to father's care and mother lived in Texas. It was decided to leave the children in out-of-home care.

A dependency petition was filed that day alleging the girls came within the provisions of section 300, subdivision (b)(1) (failure to protect) based on father's substance abuse and domestic violence with mother, and subdivision (d) (sexual abuse), based on mother's report that father had sexually abused L.G. No allegations were made against mother.

The social worker spoke with Stacy on May 9. Stacy explained the evidence collected and interviews completed were "credible and solid," as L.G.'s story, descriptions and timeline had never changed, and the journal entry was consistent. Stacy explained how the incident unfolded. Based on her training and experience, Stacy believed L.G. and Alyssa were telling the truth. Stacy also found Alyssa's forensic interview compelling, as she described in graphic detail how father "strangled" her on more than one occasion. In Stacy's opinion, mother had not coached Alyssa in any way. Stacy characterized Alyssa as "extremely traumatized," and said that prior to returning to California, she was in therapy for "self-harming," which she did by scratching her arms with tacks or pushpins.

The social worker asked Stacy what she thought about mother's ability to provide a safe, stable and appropriate living environment for the girls. Stacy was concerned about mother's judgment, as she appeared to have made poor choices and acted out of "desperation" to protect her children. Stacy believed mother had boundary issues, as she told the children too much adult business about the case. In addition, mother offered to relinquish custody of the girls to father if he paid off her credit cards, posted the social worker's contact information on Facebook, and asked her friends to call the Department and tell them what a good mother she was. Lastly, there was information to suggest mother pretended to be Stacy when attempting to contact father's employer. The social

worker agreed with Stacy these concerns did not rise to the level of threatening the children's safety. Stacy explained mother "has done everything she has been asked to do" while pursuing this matter in Texas and California. Texas CPS went to mother's home on May 18 and found it to be appropriate.

On June 8, the Department filed a second amended petition, which added allegations against mother. Specifically, the amended petition added allegations that the girls came within the provisions of section 300, subdivision (b)(1) based on mother's failure to protect the girls from father's substance abuse and domestic violence, and subdivision (d) based on mother's failure to protect Alyssa and L.G. from being sexually abused by father.

At the June 13 detention hearing, the juvenile court removed the girls from father's physical custody and ordered the children detained. The juvenile court stated it was giving the Department authority to offer mother a full panoply of services for reunification or placement. A settlement conference was set for July 24, and a contested jurisdiction and disposition hearing for July 31.

On June 22, the Department sent mother a letter advising her it had been ordered to offer her services in the areas of mental health, parenting, substance abuse, domestic violence and random drug testing. Mother was told to contact the local CPS agency in Texas "regarding these services that are being offered to you," and instructed to contact the Fresno County social worker once she received the services so payment could be arranged. The letter gave the address and telephone number of the Texas CPS agency.

The Disposition Report

In a disposition report, the social worker stated that mother had initiated services in Texas. Mother's victim advocate in Texas was helping her to enroll in domestic violence classes and parenting. The social worker further stated mother needed assistance with transportation to court proceedings and help finding a drug testing service

in Texas. Mother told the social worker she wanted to bring the girls home. She had housing for them, as well as the support of family and friends in Texas.

The social worker opined there would be substantial danger to the girls' physical or emotional well-being were they returned home, and there were no reasonable means by which their physical health could be protected without removing them from father's physical custody. The Department did not recommend return of the girls to father, as he continued to abuse alcohol even though he had completed a driving under the influence course, minimized the domestic violence between him and mother, and denied the sexual abuse allegations.

The Department recommended mother be denied placement of the girls pursuant to section 361.2(a), although it would continue to assess mother for possible placement. The social worker opined there would be substantial danger to the girls' physical or emotional well-being were they to be placed with mother as she: (1) had a history of exposing her children to domestic violence and ongoing hostility between her and father; (2) reasonably should have known father had a substance abuse problem, yet she failed to take action to protect the girls and left them in father's care, rather than take further action to obtain custody; and (3) disclosed to the Texas sheriff's deputy that "on one occasion, [father] was groping Alyssa and that he was always touching Alyssa and joking about sexual contact with Alyssa," and L.G. told her father sexually abused him about a month before. In addition, mother failed to provide adequate care, supervision and protection for the children, as she did not take further action to obtain custody of them.

The Department recommended reunification services be offered to mother, and that father be denied reunification services pursuant to section 361.5, subdivisions (b)(6), based on the allegations of severe sexual abuse and lack of benefit to the girls, and (b)(13), based on father's history of chronic alcohol abuse and resistance to prior court-ordered treatment.

The contested jurisdiction/disposition hearing was continued to September 10. In an addendum report, the Department recommended the girls be adjudged dependents and remain placed in out-of-home care; mother be denied placement of the girls under section 361.2(a), and reunification services be ordered; and father be denied reunification services. While the Department previously had recommended the case be transferred to Texas, it now recommended that it remain in Fresno County. The Department received the “MDIC Audio interview compact discs” from the Texas sheriff’s office, which it attached for the juvenile court’s consideration.

The Jurisdiction/Disposition Hearing

Testimony at the combined jurisdiction and disposition hearing took place over two days, September 10 and 11, and the juvenile court issued its decision on September 20. Mother was not physically present at the hearing, as she lived in Texas and was unable to travel. The Department submitted on its reports.

L.G., who was in the fourth grade, testified from Texas via video. L.G. said they moved to Texas because father “wasn’t being that good of a father,” as he “was yelling always” and “hurting” him, his sisters, and mother. Father always asked for a second chance, but when given one, nothing changed, so finally one day they “actually left.” L.G. testified about the incident where father grabbed him by the neck and slammed him against the wall. L.G. also claimed father said “a lot of mean things” to him and his sisters, and father called him names.

The worst thing father had done to L.G. was molest him. L.G. recounted the sexual abuse incident, consistent with his prior accounts. He told mother about the incident “[m]aybe two months later” when they were still in Fresno and she said they were leaving for Texas. Mother did not believe him at first, but by the time they arrived in Texas, she finally believed him. According to L.G., he did not know they were going to Texas until the morning of the day they left. L.G. said he wrote the journal entry about the sexual abuse incident when they were in Texas. He had already told mother about the

incident; she told him to write exactly what happened and to be honest about it. L.G. did not see father again face-to-face after he left for Texas. He saw father once on Skype, when he was supposed to tell father he was mad at him for “doing that,” but he was “extremely shy” so he did not tell him. His counselor recommended he confront father and tell him, either over Skype or in writing, that he did something wrong, so L.G. could move on.

Father’s attorney asked Department social worker Jose Vargas what efforts the Department made to avoid removal from father. Vargas responded that it was not safe to leave the girls in father’s care due to the vehicle accident. In addition, since father had full custody of the girls, there was no legal option but to remove them from him. According to Vargas, it was not an option for father to go into an inpatient program and have the girls stay with paternal grandmother in the family home because the recommendation following father’s substance abuse assessment was for less intensive outpatient services, not an inpatient treatment program. In addition, at that point the Department was looking at placement, not a safety plan, so the girls could not be placed with paternal grandmother at father’s house. Instead, the “RFA” process needed to be completed, but there was a barrier, as paternal grandmother was a Nevada resident.

On cross-examination by County counsel, Vargas testified that one of the Department’s concerns was L.G.’s rape allegation. Vargas agreed that father going into a rehabilitation facility, taking domestic violence classes, or testing clean would not alleviate the risk of sexual abuse to the girls. Vargas added that each individual service component would not address the entirety of the concerns in the case. The juvenile court recognized that treatment within a short period of time usually was not ameliorative given the nature of the concerns here.

Eva Torres was the Department social worker assigned to investigate the March 14 allegation of general neglect and possible sexual abuse of L.G. and the girls. Torres interviewed Alyssa and Kaylee, but not L.G. Kaylee would not talk to her and Alyssa

denied that father abused her in any way; she merely overheard mother talking about father asking L.G. to perform oral sex on him. The outcome of the investigation pertaining to sexual abuse was inconclusive, as there was an ongoing investigation at the time by the Fresno County Sheriff's Department. Torres did not do any follow-up investigation. At some point in May, after the girls were removed from father, Torres closed the referral as inconclusive for sexual abuse. Torres confirmed the children seemed safe with father, there were no signs of physical or sexual abuse, and the girls looked comfortable with father.

Paternal grandmother testified about her requests for placement of the girls. Although she lived in Las Vegas and was willing to have them placed with her there, she also offered to take placement of the girls in California.

Father, who testified on his own behalf, denied L.G.'s allegations of sexual abuse. The Fresno County Sheriff's Department interviewed him about the allegations in April, but had not contacted him again and he had not been arrested for sexual abuse. He was arrested in May for driving under the influence and that case was still pending. Father believed mother went to Texas to be with Javier, an old high school friend, because Alyssa said they were going to Texas to be with Javier but if it did not work out, they were going to use father as a "backup plan." Father confronted mother, who said Alyssa was lying and they were going to Texas for her cousin's wedding.

When mother did not return from Texas, father sought custody of the girls by filing for divorce. While mother would have been given 50/50 custody had she remained in California, she returned to Texas. Mother sent him various text messages, on or after June 13,⁶ which the court admitted into evidence. Father did not believe he choked

⁶ In the text messages, mother stated she missed father and cared about him; she asked to stay at his house prior to a hearing; she asked what went wrong and how to fix it; she missed "what we had when it was good" and asked if they could ever be a family again; and she wanted father to call her. Mother also told father: (1) he should let her have the girls "otherwise if you fight me, I'll fight back and I'll do everything to get your

Alyssa. He did not remember doing it, had never put his hands on the children, and did not know why he would have done that. Father denied calling the children names, although he did call mother names while the children were in the house. Father testified that at the end of February or beginning of March, mother called his place of employment and told the receptionist who answered the call that she was Stacy. When the receptionist asked for the badge number, mother hung up. Father knew it was mother because her phone number showed up on the caller ID.

Father's first DUI was in 2008 in Las Vegas. The offense was a misdemeanor and he was required to take a five hour class and pay a "huge fine." His second DUI arrest was in November 2015 in Fresno, but he was not convicted until around November 2017. As a result of the conviction, he was placed on probation and required to perform community service, pay a fine and complete a six-month first offender program.

The children's attorney asked the juvenile court to find the allegations of the second amended petition true. The attorney further asked the court to adopt the Department's recommendations to offer mother reunification services and not place the girls with her, as she had a number of issues she needed to address, including mental health services and counseling, as well as domestic violence and being a protective parent to prevent the girls from being exposed to ongoing domestic violence in the future.

Mother's attorney asked the juvenile court not to sustain the allegations against mother. Mother's attorney argued the Department ignored the following facts: (1) mother removed the children from father and reported father's sexual abuse of her son and domestic violence to Texas law enforcement; (2) the Fresno County family court ordered mother to return the girls to father, which mother would not have done otherwise; and (3) after the family court issued its order, the Department received a referral about

rights revoked completely"; and (2) when father did not respond to her text messages, "I've tried my hardest, you are now my enemy."

the abuse allegations. In addition, the social worker agreed with Stacy that mother's poor choices did not rise to the level of threatening the children while in mother's care.

Mother's attorney asked the court to place the girls with mother under section 361.2, as she was the only party in the case who acted to protect the girls and there was no ongoing risk of domestic violence or sexual abuse.

Father's attorney stated father was not challenging the substance abuse allegation, but was asking the juvenile court to find the sexual abuse allegation not true. The attorney argued L.G.'s account was fabricated and pointed out that while the Department claimed mother said father groped Alyssa and made inappropriate sexual comments about her, mother, in her interview with Stacy, clarified that while father groped her in front of the children, he did not grope Alyssa. Father's attorney further argued father should be offered reunification services as it would be in the girls' best interest to reunify with him. Finally, the attorney asked the court to order an "ICPC" assessment of paternal grandmother and place the girls with her.⁷

County counsel asserted, with respect to mother's argument, the Department had shown by a preponderance of the evidence the counts against mother were true and provided an extensive detriment analysis in its disposition report, which it asked the court to review. With respect to the sexual abuse allegation, County counsel argued L.G. was credible. County counsel asked the court to find the allegations of the second amended

⁷ ICPC stands for the Interstate Compact on Placement of Children (Fam. Code, § 7900 et seq). "The ICPC is an interstate compact designed 'to facilitate the cooperation between states in the placement and monitoring of dependent children.' [Citations.] Among other things, the ICPC provides that a dependent child subject to the compact's provisions 'shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.' (Fam. Code, § 7901.)" (*In re Z.K.* (2011) 201 Cal.App.4th 51, 58, fn. 4.)

petition true, deny father reunification services, not place the girls with mother, and order mother reunification services.

When the juvenile court issued its ruling, it found the allegations of the second amended petition true. It also stated it was amending the domestic violence allegation to conform to proof by adding direct physical violence perpetrated by father against Alyssa and L.G.

With respect to disposition, the juvenile court first took up the issue of placement and “most fundamentally consideration of temporary placement with mom under ICPC guidelines,” or possibly “ultimate dismissal of the case with custody and visitation issues[,] [i]f we find mom nonoffending noncustodial parent deemed safe and willing to take custody under 361.2(a).” The court noted it clearly found her to be offending, although she was noncustodial, but stated it found “detriment as well” and did not “find grounds” to begin “the ICPC process in Texas” or any other state for the reasons given for his jurisdictional findings. The court explained that mother was part of the family dynamic involving multiple forms of abuse and was fully aware of father’s problems, behaviors and what he was capable of, yet she failed to protect the girls and enabled father, which continued in mother’s messages seeking reconciliation with him. The court also found it significant that mother essentially abandoned the girls to father, who she admitted was dangerous to her children, by not remaining in California once she was granted 50/50 custody of the girls.

The juvenile court found the girls were described by section 300, subdivisions (b) and (d); removed them from father’s physical custody under section 361, subdivision (c)(1); found by clear and convincing evidence reasonable efforts were made to prevent removal and there was substantial risk of detriment in returning the children to father, and mother for that matter, at the time; denied father reunification services; ordered reunification services for mother; granted mother visitation and ordered the

Department to assess the prospect of the girls visiting mother in Texas; and granted father twice monthly visits.

Mother and father filed separate notices of appeal. Father's appointed counsel filed a brief informing this court that counsel found no arguable issues to raise on appeal. (*In re Phoenix H.* (2009) 47 Cal.4th 835, 846.) We gave father an opportunity to state issues for review and he did not state any. We dismissed the appeal as to father and now proceed to consider mother's appeal.

DISCUSSION

I. Jurisdiction and the Removal Order

The crux of mother's appeal is her contention that she is a non-offending, noncustodial parent to whom the juvenile court should have given custody of the girls pursuant to section 361.2(a). To that end, mother argues the jurisdictional allegations as to her are not supported by substantial evidence; the juvenile court erred in denying placement with her based on an ICPC; and there was insufficient evidence of detriment.

A. Jurisdiction

We begin with the jurisdictional allegations.⁸ The following allegations pertain to mother: (1) under section 300, subdivision (b)(1), that mother failed to protect the girls

⁸ We note the juvenile court's assertion of jurisdiction would be supported by the sustained findings regarding father's substance abuse, domestic violence and sexual abuse, which mother does not challenge on appeal. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [when dependency petition alleges multiple grounds for assertion that minor comes within dependency court's jurisdiction, reviewing court may affirm the juvenile court's finding of jurisdiction if substantial evidence supports any one of the enumerated bases for jurisdiction].) Appellate courts, however, generally exercise discretion to reach the merits of a challenge to a jurisdictional finding where, as here, it "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings" (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) As mother was the noncustodial parent when the Department intervened, the jurisdictional findings as to her are ordinarily reviewed due to their negative impact on a

from father's conduct, namely his substance abuse, and had a history of exposing the girls to domestic violence and ongoing hostility between her and father (counts b-2 and b-4, respectively); and (2) under section 300, subdivision (d), the girls were at substantial risk of being sexually abused if left in mother's care as she failed to protect Alyssa and L.G. from being sexually abused by father (count d-2). Mother argues there was no evidence that father's history of substance abuse or prior acts of domestic violence created a current risk of harm, and there is no evidence that she failed to protect Alyssa or L.G. from sexual abuse.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, we review the record to determine if substantial evidence supports the trier of fact's conclusion. In doing so, we review the record in the light most favorable to the court's determinations and draw all reasonable inferences in support of the court's findings and orders. (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

1. The Section 300, subdivision (b)(1) Allegations

Section 300, subdivision (b)(1) applies, in relevant part, when the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of [the] parent ... to adequately supervise or protect the child, or the willful or negligent failure of the child's parent ... to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, ... or by the inability of the parent ... to provide regular care for the child due to the parent's ... substance abuse." A finding under section 300, subdivision (b)(1) requires three elements: "(1) one or more of the statutorily-specified omissions in providing care for the child ...; (2) causation; and (3) 'serious physical harm or illness' to

request for custody under section 361.2. (*In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1317.)

the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; *In re R.T.* (2017) 3 Cal.5th 622, 626-628.)

The “ ‘basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.’ ” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.) Evidence of past events may be probative in assessing the current conditions “if circumstances existing *at the time of the hearing* make it likely the children will suffer the same type of ‘serious physical harm or illness’ in the future.” (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388.)

Domestic violence in the household where children live creates a substantial risk of serious harm and is detrimental to children. (*In re E.B.* (2010) 184 Cal.App.4th 568, 576 (*E.B.*); *In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Violence by one parent against another harms the children even if the children do not directly witness it. Past abuse or violent behavior makes future abuse more likely. (*E.B.*, *supra*, at p. 576 [fact that mother remained in an abusive relationship and returned to father despite the abuse supported finding under section 300, subdivision (b)(1), that mother’s conduct in domestic altercations endangered the children].)

By mother’s admission, she had been involved in a verbally and physically abusive relationship with father throughout the course of their seven-year relationship, which means the girls were subjected to abuse their entire lives. Not only did father abuse mother, but he also verbally and mentally abused the children, and physically abused L.G. and Alyssa. Mother knew father had a problem with alcohol and when he drank, he became abusive and violent. Alyssa, who was described as “extremely traumatized,” was exhibiting self-harming behavior, scratching herself with a tack or her fingernails. Mother allowed the abuse to continue until the children were begging her to leave father. It was only after L.G. revealed the sexual assault that she left father and took the girls to Texas.

Mother concedes father's verbal and physical abuse, as well as his alcohol abuse, and that she should have left him earlier. Mother contends, however, there is not a current risk of harm because, as she and father are separated, she is not likely to expose the girls to either domestic violence or father's alcohol abuse were they returned to her custody with a restraining order in place. It is mother's history of making poor choices, however, that continued to place the girls at risk of harm. Despite the extensive history of domestic violence and alcohol abuse, mother still wanted to pursue a relationship with father.

Mother relies on *In re M.W.* (2015) 238 Cal.App.4th 1444 and *In re Jesus M.* (2015) 235 Cal.App.4th 104, to assert the foregoing evidence is insufficient, but those cases are distinguishable. In *M.W.*, the court determined a single, seven year old, occurrence of domestic violence was insufficient to establish an ongoing risk of harm where there was no evidence of continued violence. (*M.W.*, at pp. 1454-1455.) In *Jesus M.*, the court concluded there was insufficient evidence of an ongoing risk of harm where the parents had long been separated, the two incidents of domestic violence the mother could recall occurred more than three years earlier, there was no indication the children had experienced physical harm, and there was no evidence of current violent behavior. (*Jesus M.*, at pp. 112-113.)

In contrast here, there was a long history of domestic violence and substance abuse by father to which mother allowed the children to be exposed; Alyssa experienced physical manifestations of serious harm in the months leading up to the Department's filing; and the girls were in danger of further harm, as mother's continued contact with father established her lack of insight into the damage her relationship with father caused the girls. While we acknowledge mother's efforts to protect the girls by taking them to Texas and making a referral to the Department once the family court ordered her to return the girls to father, these efforts do not establish there was insufficient evidence to support the jurisdictional findings. Further, the record reflects that despite the steps mother had

taken so far, she had not made meaningful progress in addressing the domestic violence issues and the girls remained at substantial risk of harm. Thus, substantial evidence supports the juvenile court's assertion of jurisdiction under section 300, subdivision (b)(1) based on the parents' history of domestic violence and mother's failure to protect the girls from father's substance abuse.

2. The Section 300, subdivision (d) Allegation

Count d-2 of the second amended petition alleged the girls were at substantial risk of being sexually abused if left in mother's care, as mother failed to protect Alyssa and L.G. from being sexually abused by father. It was further alleged in this count that: "On January 2, 2018, [mother] disclosed to the Hays County Sheriff's Office in the state of Texas that on one occasion, [father] was groping Alyssa and that he was always touching Alyssa and joking about sexual contact with Alyssa. [Mother] further stated [L.G.] informed her he was sexually abused by [father] approximately a month prior (around November 28, 2017). In addition, on January 12, 2018, [L.G.] disclosed to the Hays County Sheriff's Office being sexually abused by [father]. The sexual abuse consisted of, but was not limited to[,] anal penetration, oral copulation, and pornographic video." In upholding this allegation, the juvenile court commented that mother allowed father to engage in "deviant sexual tendencies" in their relationship, he joked while under the influence, and there was sexual contact with Alyssa "in a method by which he touched her and in the habit of walking around the home skimpily or unattired."

Section 300, subdivision (d), applies when the child "has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent ..., or the parent ... has failed to adequately protect the child from sexual abuse when the parent ... knew or reasonably should have known that the child was in danger of sexual abuse." (§ 300, subd. (d).)

As pertinent here, Penal Code section 11165.1 defines sexual abuse to include any act that violates Penal Code section 647.6, which makes it a crime to annoy or molest any

child under 18 years of age. (Pen. Code, § 11165.1, subd. (a).) This section does not require a touching, “but does require (1) conduct a ‘ “normal person would unhesitatingly be irritated by” ’ [citations], and (2) conduct ‘ “motivated by an unnatural or abnormal sexual interest” ’ in the victim.” (*People v. Lopez* (1998) 19 Cal.4th 282, 289.) “The primary purpose of [Penal Code] section 647.6 ‘is the “protection of children from interference by sexual offenders....” [Citations.]’ [Citation.] ‘The deciding factor for purposes of a Penal Code [section] 647.6 charge is that the defendant has engaged in offensive or annoying sexually motivated *conduct* which invades a child’s privacy and security, conduct which the government has a substantial interest in preventing....” (*In re D.G.* (2012) 208 Cal.App.4th 1562, 1571.) In *People v. McNair* (1955) 130 Cal.App.2d 696, the statute was violated while the defendant stood naked at his apartment window exposing his penis to a seven-year-old girl; he admitted he was about to masturbate and would have let the girl “ ‘look if she want[ed] to.’ ” (*Id.* at pp. 697-698.)

Here, mother reported that father had a history of being “touchy feely” with himself around the children, thought it was funny to “flash them,” and humped her “doggy style” in front of the children. While there is no evidence that father groped Alyssa or otherwise molested her, mother said he would come up to Alyssa from behind and “smack[] her butt,” and he ran around the house wearing boxers without adequate coverage, thereby exposing himself to the girls. Father admitted he did not always have his clothes on when he walked about the house.

Father’s repeated acts evidenced his abnormal sexual motivation, and would irritate a normal child and invade her privacy and security. His conduct would “annoy or molest” a child within the meaning of Penal Code section 647.6, and constitute sexual abuse under Penal Code section 11165.1. Mother admittedly was aware of these acts, yet did nothing to protect the girls from them until L.G. reported father’s sexual abuse. While we agree with mother that the sexual abuse of L.G. cannot support a finding she

failed to protect the girls, as she removed the girls from the home as soon as she learned of L.G.'s abuse, it is her failure to protect the girls from father's exposing himself to them, and her inability to recognize the seriousness of this behavior, that supports the juvenile court's finding of jurisdiction under section 300, subdivision (d).

B. The Detriment Finding under Section 361.2(a)

Mother contends the juvenile court erred in denying placement with her under section 361.2(a), as it premised the denial on the applicability of the ICPC and the record fails to establish detriment.

Section 361.2 protects the custody rights of a noncustodial parent when the juvenile court removes the child from the custodial parent. In essence, it requires the juvenile court to place the child with the noncustodial parent unless doing so would be detrimental to the child. Specifically, section 361.2(a) provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

"A detriment evaluation requires that the court weigh all relevant factors to determine if the child will suffer net harm." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425.) The juvenile court's detriment finding must be based on clear and convincing evidence. (*Id.* at p. 1426.)

When the juvenile court's detriment finding under section 361.2(a) is challenged on appeal, we do not review the record to determine whether there was evidence to support a contrary finding. Rather, we determine whether there is substantial evidence from which the juvenile court could find clear and convincing evidence that placement would be detrimental. (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262 (*Patrick S.*).

Under the substantial evidence test, we “review the record in the light most favorable to the court’s order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that placement would be detrimental to the child.” (*Ibid.*)

We begin with the ICPC. Mother is correct that the juvenile court need not comply with the ICPC when placing a child with a noncustodial parent who lives in another state. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1575 (*John M.*) [“compliance with the ICPC is not required for placement with an out-of-state parent”]; see *In re Johnny S.* (1995) 40 Cal.App.4th 969, 977 [“we are persuaded that the ICPC is intended to apply only to interstate placements for foster care and preliminary to a possible adoption, and not to placements with a parent”]; Cal. Rules of Court, rule 5.616(g) [“When a child will be placed with his or her parent in another state, compliance with the requirements of the ICPC is not required”; the court, however, has discretion to take any steps its deems necessary to ensure the child’s safety and well-being in that placement, such as obtaining a non-ICPC home study or courtesy check to obtain needed information].) Thus, while an investigation under the ICPC is not required *before* a juvenile court places a child with her noncustodial parent (*Patrick S., supra*, 218 Cal.App.4th at p. 1264), a juvenile court may use an ICPC evaluation as a means of gathering information before placing a child with a noncustodial parent (*John M., supra*, 141 Cal.App.4th at p. 1572).

Mother contends the juvenile court erred in relying upon the ICPC to deny placement with her. She claims the record shows the juvenile court erroneously assumed ICPC procedures for an assessment must be followed before placement; therefore, reversal is required because the juvenile court misunderstood the proper scope of its discretion. (See *F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 25-26 [“If the record affirmatively shows the trial court misunderstood the proper scope of its discretion, remand to the trial court is required to permit that court to exercise *informed* discretion with awareness of

the full scope of its discretion and applicable law”; court’s misunderstanding of proper legal standards required reversal and remand of best interests determination with respect to move-away motion].)

The reporter’s transcript shows, however, the juvenile court denied mother placement, not because an ICPC evaluation had not been completed, but because it found detriment. While the juvenile court misstated the law when it stated it did not “find grounds to [begin] the ICPC process in Texas,” as an ICPC was not required for placement, the juvenile court found “detriment as well” and explained the basis for its detriment finding, as required by section 361.2, subdivision (c). Contrary to mother’s assertion, the record shows the juvenile court understood the scope of its discretion, as it understood a detriment finding was required to deny placement with mother and proceeded to make that finding without reference to the ICPC. It merely erred in believing that, if it did not find detriment, an ICPC was required before the girls could be placed with mother.

We turn to the detriment finding and conclude there is substantial evidence to support it. Mother had demonstrated poor judgment and an inability to protect or care for the girls. Father engaged in ongoing verbal, emotional and physical abuse with mother in the girls’ presence their entire lives. In addition, the girls were subjected to father’s verbal and physical abuse. Although mother should have known this was harmful to the girls, as Alyssa was exhibiting signs of emotional trauma and self-harming, mother did not take steps to prevent the exposure and did not separate from father until the children were begging her to leave and L.G. reported father sexually abused him.

To her credit, mother moved with the children to Texas, immediately reported the sexual abuse to Texas law enforcement, submitted herself and the children to law enforcement and forensic interviews, and obtained a temporary restraining order. When father moved to gain custody of the girls through family court in Fresno, mother appeared in court and “begged” the court to allow the girls to remain in her care; the court,

however, informed her she could have 50/50 custody only if she remained in California. Mother returned to Texas because she did not have a place to stay in California, L.G. lived with her in Texas, and she was trying to flee from father. While we do not fault mother for not remaining in California and exercising her right to joint custody, once mother returned to Texas, she did not contact father and therefore made no effort to check on the girls' welfare in California. Instead, mother offered to give up her parental rights if father paid off her debts. And after dependency proceedings began, mother continued to text father and pursue a relationship with him.

Mother contends the girls should have been placed with her in Texas because she demonstrated her ability to stay away from father by remaining in Texas and there is no evidence she would allow father to sexually molest the girls or expose them to domestic violence or his alcohol abuse. That mother separated from father and moved to a different state did not resolve mother's deeper problem, namely her poor judgment. Mother's desire to continue a relationship with father, a relationship marked by domestic violence and abuse, demonstrated that mother did not understand the harm her relationship with father caused the girls. Given mother's lack of insight into the problems that led to court intervention, it was necessary for the girls' protection to delay their return to mother until she had shown the ability to benefit from the parenting, substance abuse, mental health, and domestic violence services the juvenile court ordered.

II. Reasonable Efforts

Mother asserts substantial evidence does not support the juvenile court's finding that reasonable efforts were made to prevent the removal of the girls into foster care. She contends the Department did not make a good faith effort to assist her with accessing services to prevent removal, as it merely sent her a letter advising her to contact the local Texas CPS agency to access the services offered to her and after receiving the services, to contact the Department so the Texas agency could be paid for those services. She asks us to reverse the dispositional order removing the girls from her and placing them in foster

care, and remand the matter to determine whether they can be placed with her with appropriate services.

Mother's argument is flawed, however, because the girls were not removed from her custody. In making its dispositional order, the juvenile court specifically stated: "The children are removed from the physical custody of father." The minute order confirms the girls were removed solely from father.

Section 361, subdivision (d) allows a juvenile court to remove a child from the physical custody of the parent "with whom the child did not reside at the time the petition was initiated" if it finds, by clear and convincing evidence, that (1) "there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent ... to live with the child or otherwise exercise the parent's ... right to physical custody," and (2) "there are no reasonable means by which the child's physical and emotional health can be protected without removing the child from the child's parent's ... physical custody." But the juvenile court did not remove the girls from mother under this provision. Instead, the juvenile court assessed mother's request for placement under section 361.2(a), and determined placing the girls with her would be detrimental to their safety, protection, or physical or emotional well-being. The juvenile court was not required to find there were no reasonable means by which the girls' physical and emotional health could be protected without removing them from mother's physical custody.⁹

⁹ Section 361, subdivision (e) requires the juvenile court to "make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her *home*." (Italics added.) And, as mother points out, California Rules of Court, rule 5.690(a)(1)(B) requires the Department, if it recommends removal of the child from the *home*, to discuss "the reasonable efforts made to prevent or eliminate removal." By their strict terms, the statute and rule of court do not apply to a noncustodial parent.

Mother's argument centers on whether the Department provided her with reasonable services designed to prevent removal. But since the juvenile court did not remove the girls from mother, her claim is meritless.

DISPOSITION

The juvenile court's orders are affirmed.

DE SANTOS, J.

WE CONCUR:

FRANSON, Acting P. J.

PEÑA, J.